

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ANTONIO ALANIS \$
VS. \$ CIVIL ACTION NO. 1:05cv430
STEVE MORRIS \$

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Antonio Alanis, an inmate confined within the Bureau of Prisons, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The court previously referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge concerning the petition. The magistrate judge recommends the petition be denied.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such referral, along with the record, pleadings and all available evidence. Petitioner filed objections to the Report and Recommendation. Accordingly, the court must conduct a *de novo* review of the objections in relation to the pleadings and the applicable law. See FED. R. CIV. P. 72(b).

Petitioner asserts that in light of *United States v. Booker*, U.S. , 124 S.Ct. 2531 (2004), the sentence he received for

a prior criminal conviction was improper because it was based on facts which a jury did not find to be true beyond a reasonable doubt. As the magistrate judge stated, in order to challenge a federal criminal conviction in a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241, the petitioner must show: (a) his ground for review is based on a retroactively applicable Supreme Court decision which establishes the petitioner may have been convicted of a nonexistent offense and (b) his ground for review was foreclosed by established circuit law at the time the ground for review could have been raised during the petitioner's trial, direct appeal and motion to vacate proceeding. *Reyes v. Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

The magistrate judge concluded that as petitioner's ground for review was not based on the contention that he had been convicted of a nonexistent offense, his ground for review could not be raised in this proceeding. The court agrees with this conclusion. In addition, after the magistrate judge submitted his Report and Recommendation, the United States Court of Appeals for the Fifth Circuit held that the Supreme Court's decision in *Booker* did not apply retroactively to cases seeking collateral relief. *Padilla v. United States*, ___ F.3d ___, 2005 WL 1595291 (5th Cir. July 8, 2005). As a result, petitioner's objections are without merit and this case will be dismissed.

O R D E R

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered denying the petition.

So **ORDERED** and **SIGNED** this **22** day of **July, 2005**.

A handwritten signature in black ink, appearing to read "Ron Clark", is written above a horizontal line.

Ron Clark, United States District Judge